**IN THE HIGH COURT OF SOUTH AFRICA**
**(EASTERN CAPE DIVISION, GRAHAMSTOWN)**

**Case No: CA&R30/2016**

In the matter between:

**ZOLANI XEGO** **First Appellant**

**VUYELWA XEGO** **Second Appellant**

And

**THE STATE**

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**JUDGMENT**

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**BESHE J:**

[1] The appellants stood trial in the Regional Court, East London on the following charges:

**Count 1**

**Fraud:**

**IN THAT** during August 2007, and in East London, in the Regional Division of the Eastern Cape, the accused acting in the execution of a conspiracy between themselves and persons to the state unknown, with the common intent to defraud, did unlawfully and falsely misrepresent to Dr Bothma and/or to the Department of Home Affairs that Accused no 1 was dead.

**AND DID** by means of the aforesaid misrepresentation, induced the said Dr Bothma and/or the Department of Home Affairs, to their loss and/or prejudice, actual or potential, to issue a death certificate in the name of Accused no 1

**WHEREAS** the accused, when they made the misrepresentation as aforesaid, well knew that Accused no 1 was still alive.

**COUNT 2**

**AGAINST ACCUSED NO 1 ONLY (in terms of Section 156 of the Criminal Procedure Act, 51 of 1977)**

**FRAUD:**

In that on or about 19 July 2007 and at or near Port Elizabeth in the Regional Division of the Eastern Cape, accuse no 1 did unlawfully, falsely and with the intention to defraud, directly or by implication, misrepresent to the Department of Home Affairs that he was applying for a South African identity document for the first time and that an identity number had not yet been allocated to him.

And by means of the said misrepresentations induced the Department of Home Affairs to its actual and or potential prejudice to consider processing the application and to issue a new identity document to him.

Whereas when the accused made the application be well knew that he had previously been issued with an identity document.

**AND THUS** the accused did commit the crime of FRAUD.

**COUNT 3**

**FRAUD READ WITH SECTION 51 OF THE CRIMINAL LAW AMENDMENT ACT 105 OF 1977.**

**IN THAT in or during the years 2007 to 2008,** and in East London, in the Regional Division of the Eastern Cape, the accused did unlawfully, falsely and with intent to defraud misrepresent to Discovery Life that Accused 1 was dead and that accused no 2 was entitled to claim against policies **5130088318** and **5130090574**

**AND DID** by means of the aforesaid misrepresentation, induce Discovery Life and/or its employees, to their prejudice, actual or potential, to process and consider the death claim in respect of policies **5130088318** and **5130090574**

**WHEREAS** the accused, when they made the misrepresentations as aforesaid, well knew that:

- Accused 1 was still alive; and/or
- Accused no 2 was not entitled to the benefits in terms of the policies.

**COUNT 4**

**FRAUD**

In that on 02 February 2007 and at near East London in the Regional Division of the Eastern Cape, the accused unlawfully, falsely and with the intention to defraud, misrepresented to Santam Insurance and/or its employees that a

vehicle, a Chico golf with registration number DCG 692 EC, had been stolen and that accused no 2 was entitled to institute a claim for the loss of the vehicle against policy number 39810105731

And by means of the said misrepresentations induced Santam Insurance and or its employees, to their prejudice, actual and/or potential, to accept the claim and to pay out the amount of R 59 926-58 in settlement thereof

Whereas when they so misrepresented the accused well knew that the vehicle had not been stolen, and that accused no 2 was not entitled to institute a claim on the basis that it had been stolen and to receive payment from Santam Insurance.

**COUNT: 5**

**FRAUD**

**ONLY AGAINST ACCUSED NO 2 (The provisions of Section 156 of the Criminal Procedure Act, 51 of 1977, having application)**

In that on 31 January 2007 and at or near Cambridge, East London, in the Regional Division of the Eastern Cape, accused no 2, did unlawfully, falsely and with the intention to defraud, misrepresent to the South African Police Services and or Inspector Vuyani Matyaleni that her vehicle, a Chico golf with registration number DCG 692 EC, had been stolen outside her workplace

And by means of the said misrepresentations induced the South African Police Services and or Inspector Vuyani Matyaleni, to their actual and or potential prejudice, to register the complaint, open a docket with reference CAS: Cambridge 15/02/2007 and investigate the case.

Whereas when the accused lodged the complaint she well knew that her vehicle ([Chico golf with registration number DCG 692 EC] had not been stolen but that she had voluntarily handed the keys of the aforementioned vehicle to Sipho Nkumanda.

**ALTERNATIVE TO COUNT NO 5**

**ATTEMPTING TO DEFEAT THE ADMINISTRATION OF JUSTICE**

THAT the accused is guilty of the crime of Attempting to Defeat the Administration of Justice

IN THAT upon or about the 31$^{ST}$ day of January 2007 and at or near Cambridge, East London, in the Regional Division of the Eastern Cape, the accused did unlawfully and with intent to defeat or obstruct the course of justice, commit an act, to wit, lay a false complaint with the South African Police Services and or Inspector Vuyani Matyaleni, claiming that her vehicle [Chico golf with registration number DCG 692 EC] had been stolen outside her workplace when in fact it was not.

[2] The trial got underway on the 9 January 2012 after the appellants pleaded not guilty to all the charges against them. At the conclusion of the trial and on the 13 January 2015, the appellants were found guilty on all the main charges they were facing. First appellant was sentenced as follows:

Count 1: 3 years imprisonment.

Count 2: 3 years imprisonment.

Count 3: 15 years imprisonment in terms of *Section 51 of Act 105 of 1997*.

Count 4: 4 years imprisonment.

The Magistrate ordered that the sentences imposed in respect of Counts 1, 2 and 4 should run concurrently with the sentence in respect of Count 3.

[3] The first appellant was granted leave to appeal against both the convictions and the sentences, whereas the second appellant was only granted leave to appeal against the convictions by the court *a quo*.

[4] The grounds upon which first appellants' appeal is premised, are in essence the following:

The state failed to prove that he acted in the execution of a conspiracy with second appellant or persons unknown to the state, with a common purpose to commit fraud in respect of Count 1.

In respect of Count 2, the court *a quo* is assailed for accepting evidence that suggested first appellant knowingly and intentionally completed the late registration of birth document.

The conviction in Count 3 is assailed on the basis that there is no evidence that first appellant was aware that a death claim in respect of his Discovery Life policy was submitted for payment to Discovery Life.

It was further argued that the state failed to prove beyond reasonable doubt that first appellant was party to conspiracy to have the motor vehicle that is the subject matter in Count 4 reported stolen fraudulently so.

[5] The second appellant's grounds for appealing the convictions are *inter alia* that:

The state did not prove the charges against her beyond reasonable doubt.

There was no evidence that she associated herself in anyway with reporting first appellant's purported death or submitting a death claim/s to Discovery Life.

Both in supplementary heads of argument filed on behalf of second appellant and in argument before us, submissions were made in support of the assertion that the state did not adduce sufficient circumstantial evidence from which the court could conclude that the only inference to be drawn was that second appellant was complicit in the commission of the offences charged.

[6] The appellants did not testify in their defence and did not call any witnesses. In this regard, counsel for the appellants submitted that this did not put the appellants at risk of conviction, because the state's evidence was not of a nature or weight that called for an answer or explanation from them.

[7] It is common cause that on the 1 August 2007, **Dr Bothma** who had treated first appellant previously was approached by two people. A man who claimed to be first appellant's brother, and a woman, both of which he could

not identify, visited his rooms. The gentleman who had introduced himself as first appellant's brother reported that the latter had passed away. And that in order to issue the death certificate, the officials at the Home Affairs Department required a B11663 form and requested him to complete one for them. He asked the gentleman questions relating to how first appellant died. Having received that information, he deduced that he must have died from a burst artery aneurism and duly completed the requisite form and categorised the death as a natural one or one brought about by natural causes.

[8] It is also common cause that prior to the two people approaching **Dr Bothma** on the 1 August 2007, he had seen first appellant as a patient on previous occasions. Subsequent to completing the B11663 form in question **Dr Bothma** received telephone calls from a person who identified himself as first appellant's brother. He was enquiring whether **Dr Bothma** was aware of any reason why proceeds from the Discovery Life Policy had not been paid to first appellant's family. He reported that he had not received any correspondence from Discovery Life and advised the caller to seek legal advice in this regard. Subsequent to that **Dr Bothma** received a letter from Cooper Conroy Bell and Richards Inc. Attorneys requiring him to furnish them with first appellant's medical records.

[9] The letter was penned by **Ms Bulube**, a partner at the abovementioned firm of attorneys. The letter recorded that **Ms Bulube** was acting on behalf of second appellant, who is the surviving spouse of the first appellant who died

on 1 August 2007. That second appellant's claim had been repudiated by Discovery Life and required records relating to first appellants medical information.

[10] **Ms Bulube** confirmed writing the letter and outlined events leading to her addressing the letter to **Dr Bothma** to be the following:

She was consulted by second appellant who visited her office with a gentleman who resembled first appellant, who was identified as first appellant's brother ("the deceased"). This was in connection with a claim second appellant who **Ms Bulube** described as a young widow, had lodged with Discovery Life.

[11] **Ms Bulube** was subjected to extensive cross-examination to test the reliability or accuracy of her evidence regarding the two people who consulted her with regards to the Discovery Life claim. She had identified the two as:

1. a person who resembled first appellant and

2. Second appellant who appeared to be a young widow at the time.

[12] Part of the cross-examination regarding whether **Ms Bulube** could identify the person she alleges was in the company of second appellant proceeded as follows:

"Mr Malusi: Would you be able to identify this person if you saw him?

Witness: Yes.

Mr Malusi: So I take it that the fact that you have said in your evidence in chief you do not know accused number 1 means he is not the person who was with Ms Xego because you've just said this person who was with Ms Xego you can identify?

Witness: That I said, yes, I did say that. My concern is that I do not know if this person might have an identical brother. If that possibility can be eliminated that there is no other person who looks like him I could positively identify him as the person who was at my offices, if that possibility can be eliminated."

[13] As far as second appellant is concerned, she remained adamant that she visited her offices to consult her regarding the claim to Discovery Life. Even though she did not have full names and identity number recorded in her notes.

[14] **Ms Pumla Mlandu**, a receptionist at AA and SM Funeral Directors testified or spoke to an entry that appeared on the Funeral Home's diary / register where names of deceased are recorded which was made by her. She was unable to give the date on which the entry was made. She had recorded that one **Hlehliso** – **Xego Vuyelwa** – Date of Birth 10 February 1968 passed away on the 1 August 2007 and place where deceased was to be buried. She testified that she did not see the body of the person referred to above. According to **Ms Mlandu** first appellant who was in the company of a "Stanley" arrived at the funeral home looking for her boss **Mr Adams**. In view of fact that **Mr Adams** was not in, she telephoned him to tell him there were people who wanted to see him. **Mr Adams** told her he was on his way back to the funeral

home. The two gentlemen left saying they would come back later. Indeed, they came back in the company of **Mr Adams** and entered the latter's office. After a while they came out. First appellant handed her a piece of paper with the particulars she stated she wrote on the diary / register of deceased persons. It is common cause that **Hlehliso-Xego Vuyelwa** is second appellant.

[15] **Mr Adams** who described himself as the Manager of A1 Funeral Services / Parlour also testified during the trial. His evidence was to the effect that first appellant visited his parlour during August 2007. He asked for a quotation of funeral expenses saying his wife had passed away. That her mortal remains were at another funeral home. That there was a misunderstanding between him and the owner of the latter funeral home. He told first appellant that he could not help him without deceased's body being at his parlour. First appellant asked if he could refer him to a parlour that could assist him. He showed him other funeral homes in Oxford Street and at first appellant's request, took him to one of the homes, Ntsika Funeral Parlour. He introduced him to the owner of Ntsika Funeral Parlour as a person who needed help.

[16] It emerged that **Mr Adams** had made more than one statement to the police in connection with this matter. Statements that were contradictory in certain respects. **Mr Adams** attributed the contradictions to the manner in which the police questioned him.

[17] According to **Mr Adams**, he did not outline the details of the assistance first appellant required from **Mr Madalane**, who he referred to as **Mr Ntsika**. He only introduced first appellant to him saying he needed help from him.

[18] It transpired that the **Mr Ntsika** that **Mr Adams** referred to is in fact **Mr Mziwonke Madalane**. He confirmed he wrote a letter confirming that the body of **Z Xego** is at his parlour as a result of information relayed to him by an ex-employee who has since died. He also testified about meeting **Mr Adams** as he was going to his office, who asked him to write a letter confirming that **Mr Z Xego's** body was in his mortuary and affixing his business stamp to form B1663. This he did because **Mr Adams** did not have a business stamp and had assured him that the body of the deceased by the name **Z Xego** was at his mortuary. At the time **Mr Adams** asked him to assist him in the abovementioned regard, first appellant was in **Mr Adams**' company.

[19] The court *a quo* also heard evidence regarding the lodging of insurance claims to Discovery Life Insurance house. **Mr Chatzkelowitz**, a forensic specialist attached to Discovery Life testified to the following effect:

He was called upon to look into claims in respect of two policies:

A discovery life plan to the value of R1.8 million. An amount that would be paid to the beneficiary in the event of the life assured dying. In this case **Zolani Xego** was principal life assured. The nominated beneficiaries were life assured's two children. Later however the beneficiary was changed to being **V Hlehliso** who was indicated to be the life assured's spouse. The second Discovery Life policy was taken in 2006 by **Mr Zolani Xego**. The value thereof was R1.7 million. The beneficiaries in respect of this policy were the life

insured's two children. On the 13 August 2007 a death claim that was purportedly signed by **Ms Vuyelwa Hlehliso** in respect of the two policies. It appears to be common cause that this is the second appellant. The claim appeared to have been faxed from East London and bears AVBOB at the top. It recorded that first appellant passed away on the 1 August 2007. The proceeds from the policies was to be paid to an FNB account in the name of **Vuyelwa Hlehliso**. **Mr Chatzkelowitz** testified that during the course of processing the claims in question, it transpired that at the time of applying for cover, the life assured had not disclosed that he suffered from agoraphobia, panic attacks and adjustment disorder which resulted in both policy contracts being declared null and void. Had the claims been accepted, Discovery Life would have paid out R3,5 million. It also transpired that attached to the claim forms were *inter alia*, copies of appellants' Identity Documents and a cancelled cheque belonging to second appellant. Claims in respect of the Discovery Life insurance policies or contracts were not the only claims submitted following the purported death of first appellant.

[20] A claim for R96 777.65 to Sanlam was submitted by first appellant's former wife, **Ms Lulama Xego**. **Ms Xego's** evidence was that she had two children with the first appellant from whom she got divorced in 2005. During August of 2007 she received documentation pertaining to first appellant's passing contained in an envelope that was placed under her door. The envelope contained first appellant's date of birth given as 10 February 1968, a document that was authored by a doctor certifying first appellant dead and a letter from Ntsika Funeral Parlour, as well as a copy of a death certificate. She used these documents to obtain an original death certificate from the Department of Home Affairs. This was after she had tried to get hold of first

appellant in vain. Having waited for two days thinking somebody would contact her about the documents, she decided to lodge a claim to Sanlam Insurance Company. She received the pay out in October of the same year. In December 2007 first appellant showed up at her house. He denied any knowledge of documents **Ms Xego** found under her door pertaining to his purported passing. First appellant later sent her an SMS warning her that she risked being arrested and leaving her children without care if she were to tell the police or Sanlam that it turned out he (first appellant) was still alive.

[21] It transpired that **Ms Xego** was charged with theft in connection with this claim, a charge to which she pleaded guilty.

[22] **Ms Xego** denied that she obtained the documents about first appellant's purported death without any assistance. That she did so on her own and that she committed the fraud.

[23] In respect of Count 2, it was alleged that first appellant defrauded or misrepresented to the Department of Home Affairs that he was applying for a South African Identity Document for the first time and that an Identity Document number had not yet been allocated to him. The evidence that was led in this regard is the following:

Upon being requested to conduct an investigation in respect of Identity Document Number 680201 6456 083 that was allocated to a **Zolani Xego**, **Ms Anna Susanna Steyn**, a senior fingerprint expert and investigator at the Home Affairs Department established the following from the department's data base:

On the 12 June 1989 an application for the issuing of an Identity Document was received in respect of a person born in Cathcart on the 10 October 1970 and only indicated one parent, a mother, as **Miena Selani**. This was at the East London office of the department. He was allocated an Identity Document Number 70101 6065 081.

During 1996 an application was received in respect of an Identity Document Number for the change of the surname from **Selani** to **Xego**. The application was approved.

Once again, during September of 1997 an application was made in respect of the same Identity Document Number for the change of the date of birth from 1970 to 1968. This was also approved with the result that the previous Identity Document Number was deleted from Home Affairs records and 680210 6456 083 was allocated to **Zolani Xego**.

Another Identity Document with the last-mentioned number was again issued to **Zolani Xego** on the 19 November 2003.

In March 2006 an application for date of birth certification was once again obtained, this time to the original 1970.

On the 9 July 2007 an application for the issue of a first time identity document by means of late registration of birth was in respect of **Zolani Xego**, born 10 February 1970 at Port Elizabeth was made. The fingerprints in respect of this application were found to be identical with those in respect of an Identity Document Number issued previously, namely 680210 6456 083.

[24] It also emerged from the records kept by the department, the death register, that the death of **Zolani Xego** with Identity Document Number 680210 6456 083 was registered on the 7 August 2007 reflecting that **Zolani Xego** had passed away on the 1 August 2007.

She also established that the thumb print of the deceased **"Zolani Xego"** differed from the thumb prints for Identity Document Numbers 701010 6065 081 and 680210 6456 083.

[25] During cross-examination, the confusion regarding dates of birth on the part of first appellant was attributed to him being born of poor illiterate parents. Regarding the application for an Identity Document on the 9 July 2007, it was suggested to **Ms Steyn** that first appellant's application form in this regard was completed by the department's official on his behalf in particular page 12 and 13. He told the official or floor walkers who direct clients where they should go that he wanted to change his identity number.

[26] The state also adduced evidence from first appellant's mother, **Ms Mini Solani**. She testified that first appellant was born on 10 February 1970 in Cartcath. At some stage she stayed with first appellant in East London where she was working. **Ms Solani** confirmed that first appellant was assisted by her elder sister to obtain or apply for his first identity document.

[27] The following evidence was led in respect of Count 4 (the alleged misrepresentation to Santam Insurance in respect of a motor vehicle that was reported stolen):

It is common cause that Santam paid out an amount of some R59 900.00 as a result of a claim that the motor vehicle had been stolen.

[28] **Mr Sipho Nkumanda** testified that first appellant who was a friend of his called him telephonically and asked him to go to AVBOB offices in Amalinda, East London where his wife was employed. There he met with second appellant, who as first appellant's wife was also known to him. Second appellant handed him keys to a red Golf motor vehicle and asked him to drop it off at Shell garage in Umthatha where somebody will be waiting for him. At the time when he was speaking to second appellant, he could see first appellant at a nearby Shell garage. He in fact had spoken to first appellant at the Shell garage before he met second appellant. He did as he was told and drove the motor vehicle in question to Umthatha where he left it at a Shell garage. This according to **Nkumanda** occurred during 2007.

[29] **Warrant Officer Matyolweni** testified that during 2007 whilst on duty at the Cambridge police station, he assisted **Ms Vuyelwa Hlehliso** who had come to report that her motor vehicle had been stolen next to AVBOB offices in Amalinda. He opened a docket in this regard.

[30] It appears to be common cause that the person **Warrant Officer Matyolweni** referred to was second appellant. She made an admission in terms of *Section 220 of the Criminal Procedure Act 51 of 1977* wherein she stated that a VW Golf vehicle belonging to her was stolen outside her workplace on 31 January 2007. As a result of the theft of the said motor vehicle she submitted a claim to Santam Insurance since the vehicle was insured with Santam. First appellant also signed what is referred to as a

general release form to support the claim as a witness. The court *a quo* also heard evidence of a formal nature from: a forensic data analysts from MTN service provider **Ms du Plessis** as well as from **Colonel Van der Harman** of the questioned documents unit of the police. **Ms du Plessis'** evidence was to the effect that first appellant's phone was during October 2007 used in Pretoria as well as in the Eastern Cape. In the Eastern Cape it was used or a signal from the phone was picked up by the Sterling Tower in East London, which is close to the offices of Cooper Conroy Bell & Richards Inc. Attorneys where **Ms Bulube** was a partner. **Colonel Harman's** evidence was to the effect that he examined a number of documents which he specified. Due to poor quality of the documents in respect of the Discovery Life claim, he could not establish any connection greater than a probability between the handwriting of second appellant and the questioned document.

[31] Both appellants' applications for discharge at the end of the state's case in terms of *Section 174 of the Criminal Procedure Act* were unsuccessful. Both appellants exercised their constitutional right to remain silent and closed their respective cases without testifying or adducing any evidence in their defence. The Magistrate acknowledged that failure to testify by the appellants cannot be the basis for convicting them. He also acknowledged that the *onus* rests on the state to prove the guilt of the appellants beyond reasonable doubt. He was also alive to the need to treat first appellant's former wife **Lulama Xego's**

evidence with caution in view of the fact that she was convicted of fraud related to the "death" of the first appellant.

[32] Our courts have on a number of occasions enunciated the principles that govern the right to remain silent and the effect thereof under different circumstances in a criminal case. It will be apposite to quote copiously from some of those decisions which were relied upon by the Magistrate in the court *a quo* and or cited by counsel in their heads of argument in respect of this appeal. In ***Osman and Another v Attorney-General, Transvaal 1998 (2) SACR 493 CC at 500 – 501 [21] – [22]***, the following was stated in this regard:

"[21] This issue was also dealt with by the Botswana Court of Appeal in *Attorney-General v Moagi* 1981 BLR 1. The Court there had to interpret the meaning of s 10(7) of the Botswana Constitution which provides that '(n)o person who is tried for a criminal offence shall be compelled to give evidence at the trial'. Maisels JP, delivering the majority judgment, held that where the prosecution had established a *prima facie* case, '(u)nless the accused's silence is reasonably explicable on other grounds, it may point to his guilt'.

[22] Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve that prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice. The circumstances in which it would be constitutionally permissible for a court to draw an adverse inference from the failure of an accused person to testify personally is not a matter we are called upon to decide in this case and therefore I expressly refrain from doing so."

Similarly, in ***S v Boesak 2001 (1) SACR CC at 11 [24]*** the following was stated:

"[24] The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has a right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of an accused. Whether such a conclusion is justified will depend on the weight of the evidence."

[33] In a well considered judgment the Magistrate in the court *a quo*, outlined what in his view constituted a *prima facie* case against the appellants, which absent rebuttal amounted to sufficient proof of the elements of the offences charged. He reasoned as follows:

"Accused 1 was the owner of the policies bearing his name with his minor children as beneficiaries which subsequently substituted with accused No 2. See Exhibit L. Following a false registration of death of a person with the same name as the accused, Exhibit A, a claim was submitted by a person … (distinct) the name Vuyelwa Hlekiso which is the name or the maiden name of accused No 2. See also Exhibit L. The proceeds of these policies was to be deposited into account number 62093476721 held at Southernwood Branch of First National Bank. See Exhibit N. This is the same account in which Santam was requested to by accused No 2 to pay the claim subsequent to the alleged theft of her motor vehicle. See Exhibit T and Exhibit X. This indeed gives a new perspective to the evidence of van der Harman to the extent that the signature on Exhibit N was probably that of accused No 2. Three people, Landu, Madalane and Adams testified they had personal contact with accused No 1 when he approached them for assistance with the burial. As a result of this Madalane issued a letter of confirmation, Exhibit I. Ms Bulube gave evidence that both the accused consulted with her after the claim was repudiated by Discovery Life. Cell phone records show that the phone which accused 1 said in his affidavit the number belonged to him, Exhibit D, was used in East London on 23 October 2007 that is the day on which consultation was conducted by Ms Bulube. See Exhibit J. Calls were made from somewhere in the close proximity of her office building. According to statements made to witnesses the accused was in Pretoria. Shortly before the fraudulent claim was submitted accused No 1

applied for a first time identity document under circumstances which on the face of it did not make any sense taking into account his history or the history of applications to the Department of Home Affairs by accused No 1. Ms Steyn, an experienced investigator, after considering all the evidence to her disposal was of the opinion that accused 1 attempted to adopt a new identity.

As far as the charges relating to the alleged fraudulent claim of the stolen vehicle is concerned it is indeed so that the full details of the vehicle that Nkumanda said he delivered to Mthatha is unknown. As Mr Chithi argued there is no evidence that the particular vehicle was not brought back to East London at some stage, the fact of the matter is that most of us only own one vehicle. When a claim is submitted to an insurance company by the owner for alleged theft of his or her vehicle, and there is evidence that a similar vehicle was delivered during the same period to another town on the instructions of that owner that leads to much more than a suspicion. When a person that is near and dear to the owner in this case her husband, accused No 1, subsequently acts in regard to this claim in a manner that one would normally not expect of someone in his position that calls for an explanation. There is evidence by Nkumanda that he got the instruction to deliver the vehicle from accused 2 after he was called by accused No 1. On his return he reported back to accused No 1 because he thought that was a normal thing to do. There was therefore or is therefore *prima facie* evidence that accused No 1 knew that the vehicle was taken to Mthatha. Unless his wife had two vehicles of the same model he must have known that there was something untoward regarding her claim when he signed as witness on the claim form.

[34] I am not persuaded that the Magistrate's assessment of the evidence before him as amounting to a *prima facie* case that called for an explanation from the appellants can be faulted.

[35] The Magistrate concluded that the only inference to be drawn from the proven facts was that the fraudulent acts (Counts 1, 3 and 4) were committed by the appellants with a common purpose to commit the said fraudulent acts or acted together in furtherance of a common purpose.

[36] Both *Mr Koekemoer* and *Mr Jikwana* for first and second appellants respectively argued that there was no evidence that the appellants acted in furtherance of a common purpose. Both submitted that there was no evidence

of prior agreement having been reached by the appellants to commit the offences. This in my view loses sight of the fact that common purpose is not confined to instances where there is evidence of prior agreement between the accused. As was pointed out in ***S v Mziwampi 2011 (2) SACR 237 ECM at 253 paragraphs [76] – [77]*** where the salient features of the common purpose doctrine are summarised as follows:

"[76] First, a distinction needs to be drawn between liability based on a prior agreement, and liability based on active association. On either basis, the conduct imputed to the accused is the conduct by the participants in the execution of their joint venture.

[77] Second, in the absence of a prior agreement, only the active association of the accused in the particular events which contributed to or caused the crime, triggers the principle of imputation in the manner described above. In this sense, liability arising from active association is much more restrictive. Such association will depend on the factual context of each case and must be decided with regard to the individual actions of each accused. In the assessment of the individual's actions of each accused, the first four requirements for active association as set out in *Mgedezi* (*supra*) at 705I-706B and referred to above must be satisfied."

[37] The requirement for active association were stated in ***Mgedezi*** to be the following:

"In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue."

[38] The basic principle for evaluating evidence is that it must be weighed in its totality. See in ***S v Trainor 2003 (1) SACR 35 SCA, S v Van der Meyden 1999 (1) SACR 447 (W)***. The same applies to the evaluation of circumstantial evidence. The court should always consider the cumulative effect of all the

items of circumstantial evidence. See ***R v De Villiers 1944 AD 493 at 508 – 9***. In ***S v Reddy 1996 (2) SACR***, the following was stated in regard to circumstantial evidence:

"In assessing circumstantial evidence one needs to be careful not to approach evidence upon a piecemeal basis and to subject each individual piece of evidence to a consideration whether it excludes the reasonable possibility that the explanation given by the accused is true."

[39] I am of the view, having regard to the judgment of the court *a quo*, that the learned Magistrate was alive to the principle of considering the evidence in its totality.

[40] I am of the considered view that the timeline of events in this matter is very significant in assessing the role, if any, played by each of the appellants. To determine whether or not they actively associated themselves with the criminal conduct / activities in question. During the years 2005 and 2006 first appellant took out two insurances policies from Discovery Life to the value of R1.8 million and R1.7 million respectively. Beneficiaries were to be first appellant's two children from his previous marriage. Later the beneficiaries were changed to be second appellant, first appellant's wife at the time. This was in April of 2006. First appellant who had or made a number of applications to the Department of Home Affairs for *inter alia* change of birth, surname, once again in March 2006, made an application for a date of birth certificate. In July 2007 he submitted an application which purported to be one for the first time issuing of an identity document whose date of birth was now said to be 10 February 1970. The application was rejected on the basis that an identity document had previously been issued to a person with the same fingerprints as those of the applicant (680210 6456 083). On the 1 August 2007, a man and a woman approached **Dr Bothma** to report that first appellant had passed on and required him to complete certain documentation in this regard. According to **Ms Landu** first appellant who was in the company

of a certain **Stanley** visited their office, a funeral home. They were looking for her manager **Adams**. Later first appellant handed her a document bearing particulars of a person who was said to be deceased. **Hlehliso-Xego Vuyelwa** whose date of birth was 10 February 1968. **Adams** and **Ntsika** also testified that first appellant was present during the process of negotiations with their respective funeral palours. On the 13 August 1007 a death claim/s was purportedly signed by second appellant and later received by Discovery Life. Attached thereto as indicated earlier in this judgment were copies of appellants' identity documents, first appellant's death certificate which was issued on the 7 August 2007 as well as a cancelled cheque from second appellant's cheque book. On the 9 October 2007 Discovery Life repudiated the claims. A letter to this effect was addressed to second appellant. During the same month, October, according to **Ms Bulube** second appellant and a person she described as resembling the first appellant visited her office in connection with the repudiated claim. During August, first appellant's former wife **Lulama**, received documents pertaining to first appellant's purported death, which enabled her to claim from Sanlam Insurance. The documentation purportedly submitted by second appellant to Discovery Life (the claims) were seemingly faxed from AVBOB. It is common cause that second appellant was employed at AVBOB.

[41] What are the chances of a random person, for lack of a better word, going to all the trouble of staging first appellant's death without the appellant's knowledge and participation? This without any apparent gain / benefit on the person's part. Staging first appellant's death involved *inter alia*: Approaching **Dr Bothma**, **Messrs Adams** and **Madalane** / **Ntsika**. Reporting deceased's death and obtaining a death certificate from Home Affairs. Obtaining appellant's personal documents such as their identity documents and a leaf from second appellant's cheque book. The submission of claims to Discovery Life apparently from AVBOB a company for which second appellant works.

This would also entail that that person would have intimate knowledge of appellants' affairs. Being aware that just the previous year, first appellant changed the beneficiaries and replaced them with second appellant. This person or persons, even though the money from Discovery Life would have been paid into second appellant's account, happened to know that the claim was not honored and called **Dr Bothma** to ask if he knew of any reason the claim was not honored. This person who stood to benefit nothing went about getting legal advice as to why the decision not to pay by Discovery Life can be challenged. This person goes further in his or her benevolence, and makes it possible for first appellant's former wife to claim from Sanlam.

[42] There is evidence from several witnesses – **Landu**, **Bulube**, **Adams** and **Madalane** that implicates the appellants as having actively participated at different stages of the process of "killing" first appellant and the subsequent process relating to claiming or following up on claim to Discovery Life.

[43] On the basis of the above, in my view, there is only one reasonable inference that can be drawn from the proven facts: that the appellants acted together in furtherance of a common purpose to fake first appellant's death so that claims could be submitted on his life policies. They acted together to defraud Santam in respect of the VW Golf motor vehicle.

[44] In the circumstances, I am unable to find that the Magistrate erred in finding that there was proof beyond reasonable doubt that the appellants committed the offences charged.

[45] First appellant was also granted leave to appeal against the sentence. *Section 51 (2) (a) (i) of the Criminal Law Amendment Act 105 of 1997* prescribed a minimum of fifteen (15) years imprisonment for offences listed

under *Part II of Schedule 2 of the Act* in respect of offences such as fraud where:

(a) the amount involved is more than R500 000.00 or

(b) the amount involved is more than R100 000.00 if it is proved that the offence was committed by a person / group of persons, syndicate or any enterprise acting in the execution of furtherance of a common purpose or conspiracy.

[46] In respect of Count 3, had the misrepresentation to Discovery Life succeeded in respect of first appellant's policies, Discovery Life would have suffered a loss or prejudiced to the tune of R3,6 million.

[47] It is trite that deviation from the imposition of the prescribed sentence is permissible where there is weighty justification or substantial and compelling circumstances. The Magistrate found that none existed.

[48] The only discernable ground that was put forward as one such reason was that first appellant was a caregiver in respect of his two youngest children. The Magistrate correctly found that he was not a primary caregiver.

[49] It is trite that the power of an appellate court to interfere with a sentence imposed by a trial court is not of a general nature or is limited. And that sentence is a matter for the discretion of the court that sentences an accused person at the conclusion of a trial. However, where the appellate court is of the view that the discretion bestowed on the trial / sentencing court in this regard has been improperly exercised, it may interfere. In ***S v Terblanche 2011 (1) SACR 77 at 78 [2]*** the test that is applicable to determine whether interference with a sentence is justified was once again said to be the following:

"[2] In an appeal against sentence, interference is justified only on limited and circumscribed grounds, viz where the trial court's reasoning is vitiated by misdirection or where the

sentence can be said to be startlingly inappropriate or to induce a sense of shock, or the sentence is so disparate to that which a court of appeal, sitting as a court of first instance, would have imposed. Ultimately, the true enquiry is to determine whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. If there was, *cadit quaestio*. If it was not, then interference is warranted."

[50] As far as the application of the provisions of the *Criminal Law Amendment Act* is concerned, the following was stated in ***S v Malgas 2001 (1) SACR 469 SCA at 482***:

"H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."

[51] In light of the principles set out above and given the circumstances / facts surrounding the conviction of the accused in respect of the fraud against Discovery Life Insurance, does the imposition of the discretionary minimum sentence of fifteen (15) years imprisonment warrant interference?

[52] During the trial **Mr Japhta** who was representing the state referred the court *a quo* to a number of previously decided cases which he submitted were comparable to the present matter when addressing the court on sentence. The Magistrate in his judgment did likewise. In argument before us, so did **Mr Koekemoer** who represented first appellant. But as was stated in ***S v Fraser 1987 (2) SA 859 at 863***:

"Decided cases dealing with sentence may be of value also as providing guidelines for the trial court's exercise of discretion (see *S v* S 1977 (3) SA 830 (A)) and they sometimes provide useful guidance where they show a succession of punishments imposed for a particular type of crime. (See *R v Karg* 1961 (1) SA 231 (A) at 236G.) But it is an idle exercise to match the colours of the case at hand and the colours of other cases with the

object of arriving at an appropriate sentence. '(E)ach case should be dealt with on its own facts, connected with the crime and the criminal. . . ."

[53] I am of the considered view that the sentence warrants interference. Even though the offence committed by first appellant in this regard is a very serious one, I am of the view that the circumstances of the case render the imposition of the prescribed sentence unjust in that it would be disproportionate to the crime, the offender and the needs of the society. This is because appellants' endeavors to defraud Discovery Life Insurance failed and Discovery Life only suffered a potential prejudice. The appellants did not derive any benefit in this regard.

[54] There is one last thing I wish to address. Appeals from Magistrates' Courts are heard by two Judges. In similar fashion, this appeal commenced before my brother *Tshiki J* and I. We reserved the judgment. Before it could be handed down *Thsiki J* became absent or unable to perform his functions as envisaged in *Section 14 (5) of the Superior Courts Act 10 of 2013 (the Act)*. The parties have now filed a joint unconditional agreement of acceptance in terms of *Section 14 (5) (b) read with Section 14 (6) of the Act*. The parties agreed to accept my decision as the decision of the court. There will therefore be only one signatory to the judgment.

**[55] In the result, I make the following order:**

**The appeal against the convictions by both appellants is dismissed.**

**<u>Sentence</u> (first appellant only).**

**The sentence of three (3) years imprisonment in respect of Counts 1 is confirmed.**

**The sentence of three (3) years imprisonment in respect of Count 2 is confirmed.**

**The sentence of fifteen (15) years imprisonment in respect of Count 3 is set aside and replaced with the sentence of eight (8) years imprisonment.**

**The sentence of four (4) years imprisonment in respect of Count 4 is confirmed.**

**The order that the sentences imposed in respect of Counts 1, 2 and 4 are to run concurrently with the sentence imposed in respect of Count 3 is confirmed.**

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**N G BESHE**
**JUDGE OF THE HIGH COURT**

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| Date Heard | : | 10 May 2017 |
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| Date Delivered | : | 11 October 2018 |